BRIEF OF PETITIONER

IN THE

Supreme Court of the United States

OCTOBER TERM, 1920

No. 547

ELLIOTT FREDERICK, TRUSTEE IN BANKRUPTCY OF THE ESTATE OF JOHN E. SCHMIDT, PETITIONER,

vs.

THE FIDELITY MUTUAL LIFE INSURANCE COMPANY OF PHILADELPHIA.

ON WRIT OF CERTIORARI TO THE SUPERIOR COURT OF THE STATE OF PENNSYLVANIA

LOWRIE C. BARTON,
Attorney for Petitioner.
364 Frick Annex, Pittsburgh, Pa.

(27,904)

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ELLIOTT FREDERICK, Trustee in Bankruptcy of the Estate of John E. Schmidt, *Petitioner.*

versus

THE FIDELITY MUTUAL LIFE INSURANCE COMPANY OF PHILADELPHIA, a Corporation under the laws of the State of Pennsylvania, *Respondent.*

STATEMENT OF THE CASE.

That on the 20th day of September, 1902, the Fidelity Mutual Life Insurance Company of Philadelphia, a corporation under the laws of the State of Pennsylvania, issued its certain policy of life insurance, No. 132,520, in the sum of one thousand dollars, on the life of John E. Schmidt.

That said policy is payable as follows:

"The Fidelity Mutual Life Insurance Company of Philadelphia, Penna., by this policy of insurance agrees to pay the sum of one thousand

dollars at its head office in the City of Philadelphia upon surrender of the same properly receipted within sixty days after the acceptance of the due and satisfactory proof of the fact and cause of the death of John E. Schmidt, of Rochester, Beaver County and State of Pennsylvania, (the insured under this policy) and said claim hereunder to his wife, Annie M. Schmidt, or if the insured survive the aforesaid beneficiary, to his administrators, executors or assigns of the insured, subject to all the requirements, privileges and provisions in the following pages * * *"

That said policy reserves the right on the part of the insured to change the beneficiary as follows:

"The insured, with the written approval of the President or Vice-President, may upon the surrender of this policy, change the beneficiary, or with such approval it may be assigned."

That on the 19th day of December, 1912, a petition in involuntary bankruptcy was filed against the said John E. Schmidt in the District Court of the United States for the Western District of Pennsylvania at No. 8572 in Bankruptcy, and on the 8th day of January following he was duly adjudged a bankrupt. On the 8th day of February, 1913, the petitioner was duly elected his trustee and duly qualified.

That said policy of insurance was not included in the schedule which the said bankrupt was required to and did file in the bankruptcy proceedings.

That on the 4th day of April, 1913, the said John E. Schmidt, said bankrupt, died and thereupon proof of the fact and the cause of his death were duly made to and accepted by the said Fidelity Mutual Life insurance Company, and it, on the 7th day of May, 1913, paid to Annie M. Schmidt, the beneficiary named in the policy, the sum of one thousand dollars, being the proceeds thereof, and received her receipt.

That petitioner had no knowledge of the issuance of said policy until about four months after the said proceeds had been paid.

That on day of the adjudication of the said John E. Schmidt in bankruptcy, the said policy had a cash surrender value of three hundred and twenty-two ($322.00) dollars, payable to the insured.

That on the 11th day of May, 1915, petitioner brought an action in assumpsit in the Court of Common Pleas of Allegheny County, Pennsylvania, at No. 1188 July Term, 1915, Docket "D," to recover the proceeds of said policy on the ground that the same became an asset of the estate of the said bankrupt which on the said adjudication vested in petitioner under the provisions of section 70a of the Bankrupt Act of 1898, and amendments thereto (30 Statutes at Large, 565), as follows:

> "The Trustee of the estate of a bankrupt, upon his appointment or qualification, and his successors, if he shall have one or more, upon his or their appointment and qualification, shall in turn be vested by operation of law with the title of the bankrupt, as of the date he was adjudicated a

bankrupt, except so far as it is to property which is exempt, to all.

(3) Powers which he might have exercised for his own benefit, but not those which he might have exercised for some other person;

(5) Property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him;

Provided, That where a bankrupt shall have any insurance policy which has a cash surrender value payable to himself, his estate or personal representatives, he may, within thirty days after the cash surrender value has been ascertained and stated to the trustee by the company issuing same, pay or secure to the trustee the sum so ascertained and stated, and continue to hold, own and carry such policy free from the claims of the creditors participating in the distribution of his estate under the bankruptcy proceedings, otherwise the policy shall pass to the trustee as assets * * *."

That said proceedings in said Court of Common Pleas were afterwards amended so that petitioner claimed and sought to recover the cash surrender value only of said policy, and this is what was claimed in the State courts and is here claimed.

That said cause in the said Court of Common Pleas came on for trial before the Honorable Henry G. Wasson, without a jury, under a stipulation duly entered into under the laws of said State of Pennsylvania, and on the 31st day of December, 1918, said

court directed that judgment be entered in favor of the defendant, the Fidelity Mutual Life Insurance Company upon the findings of fact as hereinbefore stated and this additional finding, to-wit:

> "(10) Neither at the time the proceeds of said policy were paid nor at any time prior thereto did the defendant have any knowledge of the adjudication in bankruptcy, nor did the plaintiff give the defendant any notice that he would claim the whole or any part of said policy."

And upon said finding of fact the said court concluded as matters of law as follows:

> "(1) The defendant, in good faith, without knowledge of the adjudication in bankruptcy and in the absence of any adverse claim, paid the proceeds of the policy in strict accordance with the terms of the contract, and cannot again be required to make payment of the same or any part thereof.
>
> (2) The adjudication in bankruptcy, in the absence of actual notice of an adverse claim, created no liability on the part of the defendant to the plaintiff.
>
> (3) Judgment should be entered for the defendant."

Whereupon on the 29th day of May, 1919, judgment was duly entered for the defendant, from which judgment petitioner on the 2d day of June, 1919, appealed to the Superior Court of Pennsylvania, at No. 23 of April Term, 1920.

That afterwards on the 14th day of July, 1920, the said Superior Court of Pennsylvania affirmed said judgment of the said Court of Common Pleas of Allegheny County, Pennsylvania. That on the 20th day of July, 1920, petitioner presented his petition to the Supreme Court of Pennsylvania, praying for an appeal from the said judgment of the said Superior Court of Pennsylvania, and on the 6th day of August, 1920, said Supreme Court of Pennsylvania refused an appeal, whereupon the said judgment of the said Superior Court of Pennsylvania became final and conclusive and a judgment of the highest court of said State of Pennsylvania, in which a decision could be had. That upon petition this Court granted a writ of *certiorari*.

SPECIFICATION OF ERRORS.

Now comes Elliott Frederick, Trustee in Bankruptcy of the Estate of John E. Schmidt, petitioner, by counsel, and says that there are errors in the records and proceedings of the Superior Court of Pennsylvania in the within entitled case, and for the purpose of having the same reviewed in the Supreme Court of the United States makes the following assignments:

The said Superior Court of Pennsylvania erred in affirming the judgment of the Court of Common Pleas of Allegheny County, Pennsylvania, in holding and deciding that petitioner was not entitled to recover the cash surrender value, $322.00, of the policy of life insurance issued by the defendant (respondent) on the life of John E. Schmidt, as assets of his bankrupt estate, under the provisions of section 70-a of the Bankrupt Act of 1898, and the amendments thereto (30 Statutes at Large 565). And in affirming the ruling and decision of said Court of Common Pleas that the fact of the filing of the petition in bankruptcy against the said John E. Schmidt, and the adjudication thereon, was not notice to the said Fidelity Mutual Life Insurance Company, the respondent, of the said bankruptcy proceedings.

The said errors are more particularly set forth as follows:

The said Superior Court of Pennsylvania erred in ruling, deciding and holding:

First. That the respondent, the Fidelity Mutual Life Insurance Company, had no notice of the bankruptcy proceedings against John E. Schmidt.

Second. In considering and ruling that the case of *Frederick, Trustee, vs. Metropolitan Life Insurance Company*, 239 Federal Reporter 125, as parallel to, ruling and conclusive in the case at bar.

Third. In its conclusion of law as follows (page 21, Record):

> "The company was obliged by its contract to pay the proceeds to the beneficiary, and having done so, the contract was performed; there can be no future performance; the obligation is ended; and there can be no right in any one to demand the surrender value which was payable only on a contingency which did not and could not arise, the policy having been surrendered on payment of the proceeds thereof."

Fourth. In its conclusion of law as follows (page 21, Record):

> "But appellant contends that the company should not have paid the beneficiary, and that in some way he ought to recover the surrender value, because under sect. 70-a of the Bankruptcy Law certain rights in insurance policies which 'any bankrupt shall have' pass to the trustee. We all agree that on the facts contained in this record, the appellant has not shown that any right in this policy passed to him, and the burden was on him."

Fifth. In its conclusion of law as follows: (Page 21, Record.)

"The first and second assignments of error excepting to findings of fact, and so much of the third as complains of the findings of fact made below, are overruled."

Sixth. In its ruling in reference to the case of *Cohen vs. Samuels*, 245 U. S., 50, as follows (page 22, Record):

"There are essential differences between the position of the trustee in that case and the position of appellant.

Seventh. In its ruling as follows (page 22, Record):

"Appellant has not shown that his bankrupt had the policy; it does not appear when his wife obtained it, nor under what circumstances she held it; it is certain that she had it when she surrendered it; the bankrupt may have had the policy at his death, but it is equally true that he may have parted with it long before; that he may have had it for years. The fact cannot be settled by conjecture and there is no presumption aiding appellant."

Eighth. In its conclusion of law as follows (page 22, Record):

"This is a suit to require defendant to perform its contract, i. e., pay the surrender value thereof, and since appellant is not named as a party in the contract, he must show privity with a party to whom defendant owed some obligation.

Defendant's contract relations were not with the bankrupt alone. In the last analysis, the only fact found below on which appellant bases his right to recover are that Schmidt become bankrupt, was named as the insured in the policy having a cash surrender value, and that appellant is his trustee; that is not enough."

Ninth. In entering the judgment of July 14th, 1920, as follows (page 23, Record):

"The judgment is affirmed."

For which errors the petitioner prays that the said judgment of the Superior Court of Pennsylvania, dated July 14th, 1920, be reversed, and a judgment be entered for petitioner.

LOWRIE C. BARTON,
Attorney for Petitioner.

ARGUMENT.

It is admitted and found as facts by the Courts below that the policy in this case had a cash surrender value of $322.00 at the time of the filing of the petition in bankruptcy against John E. Schmidt, payable to the insured; that said policy was payable to the wife, Annie Schmidt, as beneficiary, or in case of her death before the insured, then to the estate of the insured, and that under the provisions of the said policy the insured had the absolute right to change the beneficiary.

That under the provisions of Section 70-a of the Bankrupt Act (30 Stat. L. 565), as follows:

> "The trustee of the estate of a bankrupt, upon his appointment or qualification, and his successors, if he shall have one or more, upon his or their appointment and qualifications, shall in turn be vested by operation of law with the title of the bankrupt, as of the date he was adjudicated a bankrupt except so far as it is to property which is exempt, to all.
>
> (3) Powers which he might have exercised for his own benefit, but not those which he might have exercised for some other person;
>
> (5) Property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him;
>
> Provided: That where a bankrupt shall have any insurance policy which has a cash surrender value payable to himself, his estate or personal representatives, he may, within thirty days after

the cash surrender value has been ascertained and stated to the trustee by the company issuing same, pay or secure to the trustee the sum so ascertained and stated, and continue to hold, own and carry such policy free from the claims of the creditors participating in the distribution of his estate under the bankruptcy proceedings, otherwise the policy shall pass to the trustee as assets. * * * "

The cash surrender value of the policy, $322.00, vested in the estate of the bankrupt on the filing of the petition in bankruptcy, and on the adjudication, in the trustee. This has been definitely and conclusively settled in

Cohen, Trustee, vs. Samuels, 245 U. S., 50.

"A policy of insurance held by a bankrupt, which has a cash surrender value at the time of the adjudication, *became an asset to the extent of such value in the trustee,* under section 70-a of the Bankruptcy Act, even when the policy is payable to a beneficiary other than the bankrupt, his estate or personal representative, if the bankrupt has reserved absolute power to change the beneficiary."

This Court (McKenna, J.,) saying at page 53:

"The declaration of sub-division 3 (Sec. 70-a) is that 'powers which he might have exercised for his own benefit' 'shall in turn be vested in the trustee, and there is vested in him as well all property that the bankrupt could transfer or which by judicial process could be subjected to his debts, and especially as to insurance policies which have a cash surrender value payable to himself, his

estate or personal representatives. It is true that the policies in question are not so payable, but they can be or could have been so payable at his own will and by simple declaration. Under such conditions to hold that there was nothing of property to vest in a trustee would be to make an insurance policy a shelter for valuable assets and, it might be, a refuge for fraud. And our conclusions would be the same if we regarded the proviso alone."

To the same effect:

Cohn vs. Malone, Trustee, 248 U. S., 450.

So the surrender value having become an asset of the bankrupt estate of John E. Schmidt, the insured, and vesting in the trustee by the adjudication, it could not be disposed of or the title or right of the trustee thereto be divested except by the action of the bankruptcy court, or the trustee acting under the provisions of the bankruptcy laws. We respectfully submit that the fact that the defendant did not have actual knowledge of the filing of the petition in bankruptcy and the adjudication is immaterial and consequently the courts below in basing their decision on this fact are in error.

"Whatever may be the limitations of the doctrine declared by this court, speaking by the late Chief Justice Fuller in *Mueller vs. Nugent,* 184 U. S., 14, where it is said: 'It is as true of the present law (1898) as it was of that of 1867, that the filing of the petition is *caveat* to all the world and *in effect an attachment and injunction, Bank vs. Sherman,* 101 U. S., 403; and on adjudication,

title to the bankrupt's property became vested in the trustee, Sec. 70-a, with actual or constructive possession and *placed in the custody of the bankruptcy court.' * * ** It is the purpose of the Bankruptcy Law, passed in pursuance of the powers of Congress to establish a uniform system of bankruptcy throughout the United States, *to place the property of the bankrupt under the control of the court,* wherever it is found, with a view to its equal distribution among the creditors. The filing of the petition is an assertion of jurisdiction with a view to the determination of the status of the bankrupt and a settlement and distribution of his estate. The exclusive jurisdiction of the bankruptcy court is so far *in rem* that *the estate is regarded as in custodia legis from the filing of the petition.*"

Acme Harvester Co. vs. Beekman, 222 U. S., 303-306.

To same effect:

Bailey vs. Ice Machine Co., 239 U. S., 268-275.
Lazerus vs. Prentice, 234 Ibid., 263-266.
Cameron vs. U. S., 231 Ibid., 710-717.
Robertson vs. Howard, 229 Ibid., 254.
Whitney vs. Wenman, 198 Ibid., 539-552.
Mueller vs. Nugent, 184 Ibid., 1-14.
Bank vs. Sherman, 101 Ibid., 403.

"The filing of the petition was a *caveat* to all the world. It was in effect an attachment and injunction. *Therefore all the property rights of the debtor were ipso facto in abeyance until the final adjudication.* If that were in his favor they re-

vived and were again in full force. *If it was against him, they were extinguished as to him and vested in the assignee for the purposes of the trust with which he was charged. Those who dealt with his property in the interim between the filing of the petition and the final adjudication, did so at their peril. They could limit neither the power of the court nor the effect of the final exercise of its jurisdiction."*

Bank vs. Sherman, 101 U. S., 403-406.

This being the law as to the interim between the filing of the petition and the adjudication, it applies with greater force after the adjudication and the property has actually vested in the trustee, and all holding property of the bankrupt which has vested in the trustee dispose of the same at their peril. The cash surrender value of the policy in this case, that is the defendant's position in relation thereto, was exactly the same as if an attachment had been issued, or an injunction restraining it from paying this money out. The filing of the petition was a *caveat* to all the world, a notice to defendant and all others to take heed.

We respectfully submit that the case of the Metropolitan *Life Insurance Company*, 239 Fed., 125, relied on by the Courts below, does not apply to this case, *the matter involved there being as to the proceeds of the policy*, which under the authorities evidently does not pass to the trustee and become an asset of the estate, and *not to the cash surrender value*. The opinion in that case distinctly shows this to be the fact, at page 126:

"Such being the case, it is manifest that the trustee has no legal right to *again collect the whole amount of this policy* from the company, and such *alleged legal right to collect the whole policy is the demand, on which he has declared.*"

Further as showing that this case only had reference to the proceeds and not to the cash surrender value is the remarks of the Court, also at page 126, as follows:

"We are not here concerned with the duty or the failure, or the omission of the bankrupt in regard to this policy, or what might have been the right of the trustee to participate in the policy had timely notice been given and steps taken by him to secure the cash surrender value of the policy, before the same was unwittingly paid by the company to the beneficiary."

This distinctly means that the trustee was entitled to the cash surrender value of the policy, but by reason of the company having no actual notice of the bankruptcy proceedings, he could not recover. While we submit this conclusion as to notice is not the law the question does not enter into this case, as it was impossible for the trustee to give notice as he had no knowledge of the existence of the policy until after the death of the insured and the payment of the policy. Nor was the same in the schedules filed by the bankrupt. The Courts below distinctly finds these statements to be facts. (Findings of Fact, page 3, Record):

"(5) The said policy of insurance was not included in the schedules which said bankrupt was

required to, and did, file in the bankruptcy proceedings."

"(8) The plaintiff had no knowledge of the issuance of said policy until about four months after the proceeds had been paid."

The fact that a writ of *certiorari* was denied in the Metropolitan case by this Court (243 U. S., 646), does not add any weight to it, as such denial was not an affirmance.

"It is, of course, sufficiently evident that the refusal of an application for this extraordinary writ (*certiorari*) is in no case equivalent to an affirmance of the decree that is sought to be reviewed."

Hamilton Shoe Co. vs. Wolf Bros., 240 U. S., 251-258.

It has also been held:

"After the petition has been filed no other court can make any order or decree which will deprive the court of bankruptcy of the exclusive control over the administration of the bankrupt's property. (Citing cases.) It follows, as a corollary to the foregoing doctrine, that after the jurisdiction of a court of bankruptcy has attached, no other court can make any order or decree which will operate to vest in anyone a claim or title to the bankrupt's property which is adverse to his trustee in bankruptcy."

In re Sage, 224 Fed., 525-529.

Affirmed C. C. A. 8, 236 Ibid, 644-653.

The Metropolitan case was on the law side of the Court and not the bankruptcy.

So the cash surrender value being undoubtedly an asset and property of the bankrupt, the fact that the Insurance Company had no actual knowledge of the bankruptcy proceedings which was the reason advanced by the Circuit Court of Appeals in the Metropolitan case, and the Courts below in this case, for finding in favor of defendant, did not enter into that case, nor does it into this, the only reason or defense that would sustain a judgment for the defendant would be for the court to find as a fact that the policy was not the property of bankrupt or his estate, had no cash surrender value, or that the right to change beneficiary had not been reserved, and conclude therefrom that defendant was entitled to judgment. These are not the facts in this case, as found by the Courts below, and from the facts so found, the only conclusion that should have been reached by the Courts below was that said cash surrender value became vested in the plaintiff, as trustee, and that his said right and title had never been divested, and therefore he is entitled to a judgment for the amount thereof, $322.00 with interest from May 7th, 1913, the date of payment of the policy.

As to the defense that the Pennsylvania Act of 1868 exempted the policy from the claims of creditors it is hardly necessary to take time to argue, it being so well settled that this act does not apply to a policy reserving the right to change the beneficiary and having a cash surrender or loan value. That it did not apply to such policy at time this action accrued. The act referred to was approved April 15th, 1868, Sec. 1,

P. L. 103, (*Purdon's Digest*, 13th Ed., Vol. 2, page 1957, Sec. 70) follows:

> "All policies of life insurance or annuities upon the life of any person, which may hereafter mature, and which have been or shall be taken out for the benefit of or *bona fide* assigned to the wife or children or any relative dependent upon such person, shall be vested in such wife or children or other relative, full and clear from all claims of the creditors of such insured persons."

The question is raised by the affidavit of defense as follows (Page 16, Record):

> "7. The defendant company is advised, and believes and therefore avers, that by virtue of the terms of the policy aforesaid, making the same payable to the wife of the insured, the proceeds of said policy are exempt under the laws of the Commonwealth of Pennsylvania from any claims whatever on the part of the creditors of the said insured."

It will be noticed that the defense is that the *proceeds* are exempt, not the *cash surrender value*.

> "Where there has been merely a designation of a beneficiary to receive the moneys payable on the death of the insured, and this designation is open to recall or change by the insured, to whom also belongs the right to cancel or surrender the policy, then, if the insured be bankrupt, the surrender value of the policy passes to the trustee."

In re Jamison Bros. Co., 222 Fed. Rep., 92, 96.

"I am clearly in accord with the foregoing proposition so tersely and clearly stated by Judge Dickinson, they rule the case at bar. There has been merely a designation of the beneficiary, which is open to recall or change by the insured, and to him also belongs the right to cancel or surrender the policy. The policy was not within the meaning of the Pennsylvania Act of 1868, taken out for the benefit *or bona fide* assigned to the daughter of the insured, Florence M. Shoemaker, for by the terms of the policy, the insured may at any time take away her interest by changing the beneficiary without her consent."

In re Shoemaker, 225 Fed. Rep., 329.

In re Herr, 182 Ibid. 716, 717, 718.

In re Dolan, Ibid., 949, 951.

In re Orear, 178 Ibid., 632, 635.

Burlington vs. Crouse, 228 U. S., 459.

Everett vs. Judson, Ibid., 474.

Partridge vs. Andrews, Ibid., 479.

Cohen vs. Samuels, 245 Ibid., 50.

"Section 2498 of the Georgia Code, 1910, providing that an insured may assign his life insurance policy by directing payment to his personal representative, or to his widow, or to his children, or to his assignee, and that no other person can defeat such direction when assented to by the insurer, does not operate to withdraw the cash surrender value from his estate in bankruptcy where the assignment was made to his wife expressly subject to his right to change beneficiaries or surrender the policy at any time."

Cohn vs. Malone, Trustee, 248 U. S., 450.

So therefore in this case it is not open to question that under the Pennsylvania Act, the beneficiary, the wife of the insured, was on the bankruptcy of the insured eliminated as a party to the contract as far as the cash surrender value was concerned, and had no right, title or claim thereto, and the payment of said amount to her by the defendant was without any color of law and in direct violation of the provision of the bankrupt act.

To overcome the effect of this act of 1868, the Legislature of Pennsylvania, passed the Act of May 5th, 1915, Sec. 1, P. L. 253 (*Purdon's Digest*, 13th Ed. Vol. 5, page 6453, Sec. 320), as follows:

> "That all policies of life insurance or annuities upon the life of any person which may heretofore or which shall be hereafter taken out for the benefit of, or assigned to the wife or children or other relative dependent upon such person, shall be exempt from all claims of the creditors of such insured persons, notwithstanding the right to change the beneficiary named has been reserved by the insured or is permitted by the insurer."

This act was repealed by the Act of May 17th, 1919, P. L., 207, Sec. 2, and the following substituted:

> "Section 1. That the net amount payable to the insurer under any policy of life insurance, or under any annuity contract upon the life of any person, heretofore or hereafter made for the benefit of, or assigned to, the wife or children or other relative dependent upon such person, shall be exempt from all claims of the creditors of such insured person, whether or not the right to change

> the named beneficiary is reserved by the insured or is permitted by the insurer."

The Courts below bases its conclusions that defendant was entitled to judgment upon the sole ground as stated in its discussion of the case (Page 5, Record).

> "It is not a distinction between the Metropolitan case and the case at bar to say that in one the demand was for the entire proceeds of the policy and in the other the demand was for both the cash surrender value and the entire proceeds. The same principle applies."

That this is error in so far as the cash surrender value is concerned is conclusively shown not only by all the authorities, but by the Metropolitan case itself as hereinbefore quoted, and it is the cash surrender value alone that is now before the court in this case.

The Superior Court affirmed the judgment of the Court of Common Pleas principally on the ground that the cash surrender of the policy did not pass to the trustee and become an asset of the estate on the adjudication of the Bankrupt, although the Common Pleas found as a fact (page 3, Record):

> "(9) On the day of the adjudication in bankruptcy the said policy had a cash surrender value of $322.60, payable to the insured,"

and no exception was taken to this finding, and there can be no question but that under the terms of the policy, in fact it shows on its face, that the bankrupt reserved and had the absolute power to change the ben-

eficiary. It is true that the Superior Court says (page 22, Record):

> "Another important distinction between the two cases (referring to *Cohen, Trustee, vs. Samuels*, 245 U. S., 50, and this case) is in the requirement of the contract that defendant shall not only have notice of a change of beneficiary, but that such change must be approved by its president or vice-president and that a change may only take place 'upon a surrender of this policy.' • • • We assume that the officer could not refuse approval without cause, but there was some reason for requiring not only the approval of the officer but also the surrender of the policy when changing the beneficiary, but whatever it was, there was not an absolute right in the bankrupt to make a change, such as was before the court in *Cohen vs. Samuels*.

This is surely error for the question as to the approval of the change of beneficiary and necessity for surrender of the policy does not enter into this case, it being admitted that the insured had the absolute right to change the beneficiary. The amended statement alleges (page 13, Record):

> "Fourth. That said policy reserved the right to the insured to change the beneficiary named in the policy • • •."

The affidavit of defense (page 15, Record) in no manner denies this. On the trial of this case in the Common Pleas Court and on the hearing before the Superior Court the evidence was submitted by stipulation of counsel as permitted by the practice of said courts,

and said stipulation distinctly provides (page 17, Record):

> "1. That the items of claim and averments of fact of the affidavit of claim or statement not denied or traversed by the affidavit of defense are to be taken as admitted."

Wherefore, this clearly admits the absolute right of insured to change beneficiary.

This ruling is contradictory for the Superior Court says that "We assume that the officer could not refuse without cause." The duty of the officer was only ministerial and he could not refuse to approve, and what possible reason could he have for not approving a change in the beneficiary? The same paragraph of the policy provides (page 2, Record):

> "* * * or with such approval it may be assigned."

Can it be contended for one instant that the officers could refuse to approve an assignment of the policy? The same construction will apply to the whole paragraph. The Superior Court says (Page 22, Record) there must be some reason for requiring "not only the approval of the officer but also the surrender of the policy when changing the beneficiary." Of course there was and the reason is that approval was required so that the company could keep track of the policy and its surrender does not mean the delivering up of the policy to the company for cancellation, but means for its surrender for endorsement as to the change of the beneficiary. These were the reasons for its approval and surrender.

This question of the assent of the insurer was before this Court in *Cohn vs. Malone, Trustee, supra* (248 U. S., 450), in construing section 2498 of the Georgia Code of 1910. This Court saying:

> "Section 2498 of the Georgia Code, 1910, providing that an insured may assign his life insurance policy by directing payment to his personal representative, or to his widow, or to his children, or to his assignee, and that no other person can defeat such direction *when assented to by the insurer,* does not operate to withdraw the cash surrender value from his estate in bankruptcy where the assignment was made to his wife expressly subject to his right to change the beneficiaries or surrender the policy at any time."

In the case at bar it was admitted that the bankrupt had the absolute right to have the cash surrender value of the policy on the date of his adjudication and that the insurer was bound to pay it to him. So the Superior Court entirely overlooked such admissions and the evidence before it as presented in the Common Pleas Court.

The Superior Court also ruled (page 22, Record):

> "Appellant has not shown that his bankrupt had the policy; it does not appear when his wife obtained it, nor under what circumstances she held it; it is certain that she had it when she surrendered it; the bankrupt may have had the policy at his death, but it is equally true that he may have parted with it long before; that he may have had it for years. The fact cannot be settled by

conjecture and there is no presumption aiding appellant."

The Superior Court overlooked the undisputed fact and finding of the Court of Common Pleas that at the date of the adjudication, the policy had a *cash surrender value of* $322.00 *payable to the insured,* (the bankrupt). Further this ruling is in effect that the mere possession of the policy by the wife was conclusive of her ownership. The Superior Court says there is no presumption aiding petitioner, but he must prove that the bankrupt had the policy. Admitting this to be true, what better or stronger evidence could the petitioner have offered than he did? His amended statement distinctly alleges (page 13, Record):

> "Fifth. That at the date of the filing of the said petition in bankruptcy against the said John E. Schmidt, and at the time of the adjudication as aforesaid the said policy had a cash surrender value of the sum of $322.00 payable to the insured, which said sum by reason of said adjudication became vested in the bankrupt estate of said John E. Schmidt, and upon his election and qualification as trustee in plaintiff, as provided by the provisions of the Bankrupt Act of the United States."

Nowhere in the affidavit of defense (page 15, Record) can be found any denial or traverse of said claim, therefore under the stipulation as to the evidence to be considered by the court (page 17, Record) these matters are admitted, and this question was not before the court, nor does it enter into this case in any manner, consequently this case in every particular is within

the rulings of this Court in *Cohen, Trustee, vs. Samuels* and *Cohn vs. Malone, Trustee, supra,* and the said findings and rulings of the State courts are directly in conflict therewith, and this argument as to the physical possession of the policy is merely an attempt by the Superior Court to overcome the effect of said rulings.

Wherefore it being admitted that at the time of the adjudication this policy had a cash surrender value of $322.00 payable to the insured, which had vested in the bankrupt estate, and in petitioner on his qualification, what does it matter who had the actual physical possession of the policy? The sole defense was that the Insurance Company had no notice of the bankruptcy proceedings. And we further submit that nowhere in the affidavit of defense or in the pleadings does the Insurance Company raise any question as to the possession of the policy. Nor was such matter raised in the Superior Court. Consequently the rulings of the Superior Court being directly contrary to the rulings of this Court as to petitioner's right and title to this cash surrender value, we respectfully submit this Honorable Court should reverse said judgment and direct that judgment be entered for the petitioner for the amount of said cash surrender value, $322.00, with interest from the 7th day of May, 1913.

Respondent in its arguments in the courts below, which will probably be repeated here, while practically admitting that the cash surrender value of the policy passed belonged to the petitioner, relied on the equity powers of said courts to relieve it for having wrongfully paid said cash surrender value to the beneficiary,

stating that it paid it in good faith, under the impression that she was the proper party. This being the case the respondent is not injured, as having paid it under a mistake of law or of fact, it is entitled to recover it back, and this, even if it had the means of knowledge which it had in this case, at hand.

> "The fact that the person making the payment has the means of knowledge at hand and overlooks the same by inadvertence is immaterial if the party receiving the money is not entitled to it."
>
> *Girard Trust Co. vs. Harrington*, 23 Sup. Ct., 615.
>
> *McKibben vs. Doyle*, 173 Pa., 579.
>
> *Cannell vs. Smith*, 142 Ibid., 25.
>
> *Clapp vs. Pinegrove Tp.*, 138 Ibid., 35.

Whereas on the other hand the cash surrender value having been paid as it was, petitioner is without remedy against the party to whom it was paid, or is he in a position to recover it from the said beneficiary, therefore the equities are with petitioner and not with respondent. But this is an action at law and not in equity, and respondent having paid money belonging to petitioner to another without any legal right cannot complain for having so paid it when by an examination, or *a question to the beneficiary*, it could have discovered the pendency of the bankruptcy proceedings against the insured.

Respondent asked in the courts below, in case the beneficiary had brought suit against it to recover the face of the policy, "* * *; what conceivable defense could have been interposed by the appellee?" Such a position is untenable, for if the respondent had been

alert, it would undoubtedly have made an examination which would have revealed the true state of affairs, then it would have had a full and complete defense to the amount of the cash surrender value, and if it made no such examination and paid this money, then it should take the consequences.

Respectfully submitted,

LOWRIE C. BARTON,
Attorney for Petitioners.